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IN THE

Supreme Court of the United States

October Term ~~1947~~ 48
No. [redacted] 23

SOLOMON MICHELSON,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION

LOUIS J. CASTELLANO,
Attorney for Petitioner.

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Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, SOLOMON MICHELSON, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered herein on the 26th day of January, 1948, in so far as the judgment affirms petitioner's conviction under the first count of the indictment; and represents to the Court:—

First: By an indictment (2-3)[1], containing two counts, filed on September 3, 1946, in the office of the Clerk of the

[1] (Numerals in parenthesis in this petition and in the annexed brief refers to pages of the record unless otherwise stated.)

United States District Court for the Eastern District of New York, the petitioner herein, Solomon Michelson, was charged in the first count, in substance, with giving a sum of money, to wit, Five Thousand Dollars ($5,000), to Maurice M. Kratter, Internal Revenue Agent, on or about July 29th, 1946, as a bribe, with intent to influence said agent's action in a matter pending before him in his official capacity; and in the second count with offering a like sum to the same agent with like intent on the same day.

Second: Petitioner pleaded not guilty to the said indictment and a trial of the issues thus presented was had on December 9th and 10, 1946, before Honorable Robert A. Inch, District Judge. The trial resulted in a disagreement by the jury and a mistrial. A second trial was had before Honorable Harold M. Kennedy, District Judge, and a jury. A verdict of guilty on both counts was returned by the jury. The District Court, on January 16, 1947, imposed sentence of imprisonment upon petitioner for 18 months upon each count, the sentences to run concurrently, and further imposed a fine of $1.00 on count one and a fine of $2,500 on count two. On the same day judgment of conviction, accordingly, was filed in the Office of the Clerk of the said District Court.

Third: Petitioner duly appealed from the said sentence and judgment of conviction to the United States Circuit Court of Appeals for the Second Circuit, which Court, after hearing, rendered its decision on January 26, 1948, affirming said judgment of conviction under the first count for giving the bribe, and reversing said judgment of con-

viction under the second count for offering the bribe, on the ground the two separate crimes charged were not proved, since, upon the evidence defendant merely gave the bribe.

Fourth: This petition seeks a review of so much of the judgment of the Circuit Court of Appeals as affirms the conviction of petitioner under the first count of the indictment.

Jurisdiction

The original jurisdiction of the United States District Court in this case is based upon the statute referred to in the indictment, viz., United States Code, Title 18, Section 91.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. Code, Section 347 (a)), and Rule 38 of the Rules of this Court.

Opinions Below

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals appears in the certified record filed herein in the office of the Clerk of this Court (177-184), and is printed in Appendix B, annexed to the brief in support of this petition.

Statement of the Matter Involved

The corrupt bargain and the payment by the petitioner to the Government Agent, Kratter, resulted from visits of Kratter to the petitioner's place of business and conversations between them respecting certain income tax returns filed by petitioner for previous years.

The principal issue and virtually the only issue presented at the trial was as to whether that bargain and payment were initiated by suggestions and threats on the part of Kratter, the Agent, or by proposals emanating in the first instance from the petitioner. Upon the testimony of the petitioner and his witnesses, supporting the former version, there was clearly coercion and entrapment inducing the payment which is the subject of the indictment. According to Kratter's version, the original suggestion was made by the petitioner.

This controversy was by no means merely colorable. The petitioner's version of the occurrence was supported in part by disinterested witnesses and by admitted circumstances. The closeness of the question involved—and the resulting importance of errors in the conduct of the trial—is manifest upon a reading of the testimony and is attested by the disagreement of the jury at the first trial.

The principal question of law presented at the trial and on appeal concerned the rulings of the Court permitting the prosecutor to introduce insinuations of an old unproved charge against the petitioner by questions put during the cross-examination of character witnesses. The questions put by the prosecuting attorney to defendant's character

witnesses concerned an arrest—not a conviction—of defendant which had occurred twenty-six years before the trial. The questions were admitted as "testing the standards" of the character witnesses in accordance with a supposed rule which has been strongly criticised by high text authority and has never been approved by this Court. The Circuit Court of Appeals apparently regarded this rule as established. The Judge writing the opinion, however, expressed his own dissatisfaction with the rule and his agreement with the contrary view expressed by Professor Wigmore. Upon this point the opinion of the Circuit Court of Appeals contains the following (183, footnote No. 8 of opinion):

> "Because, as Wigmore says, the jury almost surely cannot comprehend the judge's limiting instruction, the writer of this opinion wishes that the United States Supreme Court would tell us to follow what appears to be the Illinois rule, i.e., that such questions are improper unless they relate to offenses similar to those for which the defendant is on trial. See Aiken v. People, 183 Ill. 215, 55 N. E. 695; cf. People v. Hannon, 381 Ill. 206, 44 N. E. (2d) 923."

Questions Presented

(1) Whether the questions put by the prosecuting attorney to defendant's character witnesses respecting the *arrest* of defendant, which occurred twenty-six years before the trial, were proper cross-examination.

(2) Whether the Trial Judge, after first sustaining the objections interposed to such questions on cross-examination, erred in assuming that the decisions, upon the basis of

which he reversed his previous holding, laid down an inflexible rule of law, requiring him to overrule the petitioner's objections and leaving him without discretion to exclude such questions.

Reasons for Granting Writ of Certiorari

(1) It is desirable that the existing conflict of authority respecting cross-examination of character witnesses, which the Circuit Court of Appeals felt compelled to follow, be set at rest by a decision of this Court. The rule applied in the case at bar has never been sanctioned by any decision of this Court and, because of its objectionable features and mischievous results, should be authoritatively disapproved. In any event this Court should examine the suggestion of the Court below "that such questions are improper unless they relate to offenses similar to those for which the defendant is on trial."

(2) The rule itself and the decisions supporting it were erroneously interpreted as importing a rigid requirement that questions such as those to which objection was made herein must be admitted and that there was no discretion on the part of the Trial Court to exclude them under circumstances indicating that in the particular case concerned the effect of such questions would be wholly mischievous.

(3) The errors at the trial were plainly prejudicial, because they concerned directly the one determining issue, viz., entrapment and, in view of the closeness of the controversy, may well have accounted for the verdict rendered against the petitioner.

The Statute Involved

The statute involved is set forth in Appendix A.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit, directing that Court to certify and send to this Court for its review and determination on a day to be named in such writ a full and complete transcript of the record and all proceedings of such Court herein, being the case entitled in said Circuit Court of Appeals, "United States Circuit Court of Appeals for the Second Circuit, United States of America, Appellee, v. Solomon Michelson, Defendant-Appellant, bearing No. 130, October Term, 1947"; and that the part of the judgment of such Court as affirmed petitioner's conviction on the first count of the indictment be reviewed by this Court; and that petitioner have such other or further relief as to this Court may seem proper.

SOLOMON MICHELSON,
Petitioner.

LOUIS J. CASTELLANO,
Attorney for Petitioner.

Affidavit of Petitioner and Certification of Counsel

STATE OF NEW YORK, }
COUNTY OF KINGS, } ss.:

SOLOMON MICHELSON, being duly sworn, says: I am the petitioner herein. I have read the foregoing petition subscribed by me and know the contents thereof. The facts therein stated are true to the best of my knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

SOLOMON MICHELSON

Sworn to before me this
16th day of February, 1948.

GEORGE H. HINCK
Notary Public, State of New York
Qns. Co. Clk's No. 525
Kings Co. Clk's No. 63,
Term Expires March 30, 1949.

STATE OF NEW YORK, }
COUNTY OF KINGS, } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which petition should be granted.

LOUIS J. CASTELLANO,
Attorney for Petitioner,
Brooklyn, New York.

Dated, Brooklyn, New York,
February 16th, 1948.

IN THE

Supreme Court of the United States

October Term 1947

No.

SOLOMON MICHELSON,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinions Below

No opinion has been rendered by the District Court. The opinion of the Circuit Court has not been officially reported at the time of the writing of this brief but a copy thereof is annexed hereto as Exhibit B.

Jurisdiction

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 347 (a)).

Statement

On January 26, 1948, the Circuit Court of Appeals for the Second Circuit, unanimously affirmed the judgment of conviction rendered under the *first count* of the indictment herein upon a verdict returned after trial before Honorable Harold M. Kennedy, United States District Judge, and a jury.

The judgment of conviction on the second count was reversed by the Circuit Court and, of course, no question is involved as to that count upon this application.

Facts

For the purpose of making clear the prejudicial effect of the rulings of the trial Court to which the petitioner herein (the defendant below and hereafter referred to as defendant), interposed objections, a brief summary of certain evidentiary details is necessary.

The evidence concerned, principally, the issue of entrapment. The testimony relating to this issue does not present the frequently encountered colorable and strained effort of a defendant to charge officers of the law with having initiated the guilty purpose, but a circumstantial narrative of solicitation and intimidation, corroborated in important details by disinterested witnesses, exhibits and admissions by the Agent, from which a jury might well find that the first suggestion of a money payment came from the Revenue Agent, accompanied with the threat of unpleasant alternative in the event of refusal.

The defendant was a licensed retail dealer in second-hand jewelry, whose place of business was at 74 Bowery, in the Borough of Manhattan, New York City (10-11), where various other jewelry dealers also had space for the conduct of their business (31).

According to the evidence, both of the Government and of the defendant, the first mention of any payment of money by the defendant to Kratter occurred after Kratter had begun, but before he had completed, an examination of the defendant's books for the purpose of determining whether the defendant's tax returns for the years 1942 and 1943 were correct (8, 10-13). According to the testimony on both sides, that suggestion was made when only a comparatively small part of Kratter's examination of the defendant's records had been completed. Both agree, also, that defendant on the same day at his place of business handed Kratter a package of money which, defendant said, contained $800. Defendant said that he did so because Kratter at that stage had demanded that amount (83-4). Kratter denied making the demand and said that defendant on his own initiative offered the money after persuading Kratter to agree to accept it (16, 37). Kratter testified at one time that he agreed to accept $1,000 (36), and at another that he agreed to accept $800 (16) and at another that he agreed to accept $5,000 (39-40). According both to Kratter and defendant, they went to lunch together and, after lunch, sat together in the park for forty five minutes (36) discussing the matter of the proposed payment instead of returning to the office at once to complete the examination of the books (111-19, 83-4, 87-8).

Kratter attributed this delay to the defendant's insistence that an understanding be reached while the defendant testified that it was because Kratter was pressing his demand for a payment. At any rate, after this corrupt negotiation, Kratter gave defendant his card with his home telephone number and did not at once report the matter to his superior (19, 40-1).

The testimony of Kratter and of the defendant is in sharp contradiction as to the date of Kratter's visit to defendant's place of business during which the payment was discussed. Kratter states that it was on Wednesday, the 17th of July, 1946 (10-11). The defendant testified that it was on Monday, July 15th, 1946, the first day upon which he was back in his office after a two weeks' absence therefrom on vacation (81-4). The importance of this contradiction is that Kratter admittedly did not communicate with anyone in his office respecting his discussions with the defendant until Thursday, July 18th, 1946, and did not communicate with his superior, Special Agent Yung, until Friday, July 19th (21, 65, 71).

If Kratter's arrangement with defendant was made on Monday, July 15th, it was obviously difficult for him to explain consistently with his own innocence why he gave defendant his home telephone number and thereafter waited four days before reporting the matter to his superior. That delay would accord far more naturally with the defendant's version that Kratter himself initiated the negotiation and brought it to the attention of Agent Yung only after deciding to abandon the idea following his talk on the afternoon of Thursday, the 18th, with his older associate, Rubinstein, who was not called as a witness.

Finally Kratter made an appointment with defendant at a room in a Brooklyn hotel where the money was given by defendant to Kratter (2629, 93-94). A listening device had been installed in that room so that the conversation was transmitted to another room nearby in which other Government Agents had stationed themselves. The report of the stenographer as to the conversation was of little value as he was unable to record the entire conversation (60-62). It contained nothing calculated to enlighten the triers of the fact as to who originated the unlawful purpose.

POINT I

The questions put by the prosecuting attorney to defendant's character witnesses respecting the defendant's arrest on a charge of receiving stolen goods were unwarranted, unfair and highly prejudicial. The Trial Judge should have adhered firmly to his original ruling sustaining the defendant's objections to those questions. The Trial Judge erred in changing his holding and overruling such objections, and further erred in his instructions to the jury respecting the insinuations conveyed by such questions.

The first introduction of this objectionable matter at the present trial occurred in the prosecutor's cross-examination of Miss Mary E. Kirk (126), the first character witness called on behalf of the defendant. She was asked (127):

> "Q. Did you ever hear — A. No.
>
> Q. (Continuing) — that on October 11, 1920, the defendant, Solomon Michelson, was arrested for receiving stolen goods? A. No.

Mr. Castellano: I object to that.

The Court: I sustain it.

Mr. Castellano: I move for a mistrial; I do not think it is proper.

Mr. Pittoni: I just gave you a memorandum, I just gave you a memo on that.

The Court: I overrule the objection on the basis of United States v. Comerford, 64 Fed. (2) 28, and Stewart v. United States, 104 Fed. (2d) 234, and other cases. However, I instruct the jury that what is happening now is this: the defendant has called character witnesses, and the basis for the evidence given by those character witnesses is the reputation of the defendant in the community, and since the defendant tenders the issue of his reputation the prosecution may ask the witness if she has heard of various incidents in his career. I say to you that regardless of her answer you are not to assume that the incidents asked about actually took place. All that is happening is that this witness' standard of opinion of the reputation of the defendant is being tested. Is that clear?

Mr. Castellano: Exception.

(Last question and answer repeated.)

The Court: Any other questions?

Mr. Pittoni: No other questions.

(Witness excused)"

That the only substantial effect of this inquiry in the case at bar was to make known to the jury that the defendant had been charged on a previous occasion more than a quarter of a century earlier with a very serious offense is too clear to admit of debate. This supposed testing of the "standard of opinion" of the witness is simply a method

of destroying character testimony, nothing more and nothing less.

The question should have been promptly excluded and the jury cautioned in emphatic terms to pay no attention to such inquiry for any reason or with respect to any issue. It is doubtful if even such a cautionary instruction could have been made strong enough to cure the damage wrought by the mere inquiry and to justify denying the motion for mistrial, but that question is not presented here because the Trial Judge overcame his original impulse, which was to regard the question as clearly inadmissible and sustain the defendant's objection. He thus reversed himself in deference to the supposed peremptory requirement of the decisions cited by the Government. The Court adhered to the same ruling in the cross-examination of three later character witnesses (129, 131, 138-9). One of these witnesses, David Oppenheim, testified, that he had had occasion to discuss with other people defendant's reputation for honesty, truthfulness and being a law-abiding citizen and that defendant's reputation in these respects was "very, very good, very honest" (129). The other two witnesses gave testimony identical in substance (131, 138). In each instance the cross-examination, proceeded as follows:

> "Q. Did you ever hear that on October 11, 1920, the defendant, Solomon Michelson, was arrested in New York City for receiving stolen goods? A. No" (129, 131, 138-139).

The mischievous effect of such testimony is stated without qualification by the leading text writer upon the law

of evidence as follows (*Wigmore, On Evidence,* Second and Third Editions, Sec. 988):

> "On this principle such inquiries are almost universally admitted, but the serious objection to them is that practically the above distinction—between the rumors of such conduct, as affecting reputation, and the fact of it as violating the ruling against particular facts—cannot be maintained in the mind of the jury. The rumor of the misconduct, when admitted, goes far, in spite of all theory and of the judge's charge, towards fixing the misconduct as a fact upon the other person, and thus does three improper things,—(1) it violates the fundamental rule of fairness (*ante,* Sec. 979) that prohibits the use of such facts, (2) it gets at them by hearsay only, and not by trustworthy testimony, and (3) it leaves the other person no means of defending himself by denial or explanation, such as he would otherwise have had if the rule had allowed that conduct to be made the subject of an issue. Moreover, these are not occurrences of possibility, but of daily practice. This method of inquiry or cross-examination is frequently resorted to by counsel for the very purpose of injuring by indirection a character which they are forbidden directly to attack in that way; they rely upon the mere putting of the question (not caring that it is answered negatively) to convey their covert insinuation. The value of the inquiry for testing purposes is often so small and the opportunities of its abuse by underhand ways are so great that the practice may amount to little more than a mere subterfuge, and should be strictly supervised by forbidding it to counsel who do not use it in good faith."

It will be shown presently that such questions, while frequently allowed, are always within the discretionary power of the Court to exclude, and that it is a reviewable abuse of discretion to permit them when it is obvious that their harmful tendency exceeds their value for the purpose of testing the standards of the witness.

Sloan v. *U. S.*, 31 F. (2d) 902;
Spalitto v. *U. S.*, 39 F. (2d) 782, 787.

Although the learned author notes that such questions are almost universally permitted he does not state, nor, it is submitted, do the authorities show, that all questions of this character must be admitted, nor that the Trial Court has no discretion with respect to their exclusion or admission. What the author says, and what the cases hold, is simply that the admission of such questions is not necessarily erroneous as a matter of law. Nowhere in the books, we believe, is it held that the Trial Judge may not exclude a question of this character when he believes that its mischievous effect outweighs any possible value that it may possess as "testing the standards of the witness".

In the case at bar the witnesses were not asked whether they had heard that the defendant had received stolen goods. They could not have been asked that question because the prosecutor would certainly not have been in a position to assure the Court that he had received them. They were asked only whether they had heard that the defendant had been arrested twenty-six years earlier on a charge of having received stolen goods.

There is perhaps no kind of merchandise which, when stolen, is more likely to be received by a dealer innocently

than second-hand jewelry. The question as to the making of such a charge a quarter of a century earlier (which had not prevailed) it was certainly one which the Trial Judge, in his discretion, could properly exclude. In this case the immediate reaction of the Trial Judge was to sustain the objection interposed by the defendant. He erred in supposing that he had no right to do so. Nothing in the authorities cited by the Government, and none that we have found, establish any such drastic obligation as that by which the Trial Judge considered himself bound. On the contrary, it has been held, in well-considered opinions, that the admission or exclusion of such questions is within the discretionary control of the Trial Judge.

Spalitto v. *U. S.*, 39 F. (2d) 782, 787.

In that case the Circuit Court of Appeals for the Eighth Circuit cited and quoted with approval an Oregon decision ascribing a flexible and discretionary character to the rule which the Trial Judge, in the case at bar, held to be rigidly and universally applicable.

Shortly after the decision in the *Spalitto* case above cited, the same Court reversed a conviction because questions of this very character had been permitted by the Trial Judge.

Pittman v. *U. S.*, 42 F. (2d) 793, 797.

In its unanimous reversing opinion, Circuit Court Judge Kenyon writing, the Court said (42 F. (2d) at 797):

> "While the limits of cross-examination must, of course, be guided by the discretion of the trial court,

> * * * (citing authorities) cross-examination should not be permitted to be used to covertly convey to the minds of jurors suspicion and prejudice as to a defendant by a recital as facts of supposed matters not appearing in the evidence and wholly outside of the case."

It is submitted that the supposed principle sanctioning the admission of such questions as were put to the character witnesses here, even if applied less rigidly than it was in this case, rests upon no sound basis, that questions of this character should be excluded in every instance and that the views expressed in Wigmore's comment present the basis from which the correct rule may and should be derived. That rule would simply exclude from cross examination of character witnesses as we exclude elsewhere any questions the substantial effect of which is to inform the jury that the defendant has been charged with the commission of crimes other than those for which he is being tried and having no connection with or relevance to the issues involved.

Such is the rule applied in Illinois for which the opinion in the case at bar expresses a strong and significant preference.

> *Aiken* v. *People*, 183 Ill. 215;
> *People* v. *Hannon*, 381 Ill. 206.

In the *Aiken* case, cited *supra*, the Court held that a witness who has testified in a criminal case that the general reputation of the accused as to being a peaceable and law-abiding man is good, *cannot* be asked, on cross-exami-

nation, whether he has heard rumors of the accused having been connected with former criminal acts. At page 222, the Court pointed out:

> "There is no ground for holding that the evidence, although inadmissible, did no harm. It must be remembered that the defendant was on trial for a serious crime, and it was his right to have the evidence confined to the charge in the indictment, and evidence which had a tendency to excite the passion or prejudice of the jury, as the evidence in question certainly did, and which had no legitimate bearing on the charge upon which the defendant was arraigned, could not do otherwise than lead to an erroneous verdict."

In *People* v. *Page*, 365 Ill. 524, cited at page 210 of *People* v. *Hannon*, cited *supra*, the prosecution was permitted to ask a character witness on cross examination in a criminal case if he ever heard of defendant being arrested. The Court held it to be reversible error even though the witness answered in the negative, as in the case at bar. The Court said:

> "The questions asked on cross examination had no justification. Their tendency was to prejudice the jury against the defendant. * * * Where such aspersions appear in the record the question is not what a court of review may think of the defendant's guilt or innocence but what the jury would have done if the case had been submitted to them without those aspersions."

The general rule laid down in the *People* v. *Hannon* case, cited *supra*, is stated at page 211, as follows:

> "Where the matters about which the inquiries are made have no connection with or relation to the offense charged, it is reversible error to ask such questions, even though objections thereto are sustained."

If this simple and salutary principle is preferable to the rule applied in this case, the circumstances at bar present an occasion appropriate for a decision to that effect. The controversy was real and the evidence was in serious conflict. Numerous details of the conceded circumstances surrounding the negotiations between the defendant and the Agent Kratter are reconcilable much more naturally and readily with the view that Kratter initiated the corrupt deal by demanding a payment of money from the defendant than with the Agent's narrative that the defendant, early in his contacts with the Agent, offered him money, insisted in taking him to the park for a discussion of the amount which he should pay, and that the other particulars ensued which are essential elements of the Agent's story. The good character of the defendant was of great importance, and the proof thereof might well enough have been decisive in his favor.

The Government included in its attack upon that character the disclosure of this unsubstantiated charge of a crime made, but not proved, twenty-six years before.

The defendant's version of the transactions between himself and the Agent Kratter, if true, would render him dispunishable for the corrupt deal prompted by the Government's own Agent, and would have entitled him to a verdict of not guilty. The Court correctly so charged

(152) *Sorrells* v. *U. S.*, 287 U. S. 435; *Lucadano* v. *U. S.* 280 Fed. 653, 2nd Cir.).

The defendant properly introduced cogent and abundant evidence of his good character. The prosecution was allowed to attack that evidence by insinuating that the defendant twenty-six years earlier had been arrested upon an accusation that he had received (with guilty knowledge) stolen goods. These questions could not possibly "test the standards of the witness", who had testified that the defendant's reputation was very good, but it could and did tend to suggest to the jury that the defendant was, and long had been, an unscrupulous and dishonest merchant. It is not necessary to argue that such insinuation was the purpose of the prosecuting attorney. It is enough that the working of this mischief was the only substantial result to be anticipated under the circumstances of this case from the Trial Judge's admission of these questions.

The artificiality of this whole line of inquiry is attested by the care which the trial Judge took to obtain the prosecutor's assurance that there was such an arrest as his questions implied (146-7) and his meticulous caution to the jury that, nevertheless, they must not assume any such arrest to have been made (154). The mere fact that the Court went to unusual lengths in cautioning the jury as to the relevancy and weight of such evidence indicates clearly the importance of the problem, not only to defendant but also to the Court (378-9, 389, 461-2). What effect has such persistent instructions upon the jury! If the rule necessitates such painstaking explanation is not the inevitable

effect to impress upon the jury the fact - not directly admissible in evidence - that the defendant has been arrested on one or more occasions. Is a prosecutor to be permitted to ask an unlimited number of questions regarding previous arrests? Or if the trial Judge, in his discretion limits the inquiries, upon what basis is the selection to be made? Is not a defendant who has had a previous arrest or arrests not indirectly deprived of his right to call character witnesses in his behalf?

The impropriety of asking the question as to the remote 1920 arrest is evidenced also by the fact that Mary E. Kirk, the first character witness to be asked that question, testified on direct that she had known the defendant only fifteen years, or since 1932 (p. 126). The damaging question was asked on cross-examination relating to an alleged arrest assumed to have occurred twelve years prior to her acquaintance with defendant.

The prosecutor made a further effort to create the impression that defendant committed another serious crime on cross-examination, and attempted to make it appear that defendant was a counterfeiter of trademarks (101). While the Court sustained the objection to the following question by the prosecutor, prejudice did result therefrom.

> "Q. When you made this application for a license in 1930, you did not put on there, did you, Mr. Michelson, that on March 24, 1927, you were convicted of counterfeiting trademarks on watches and that you were sentenced to pay either $200 or 30 days in jail. You did not put that down, did you?

Under the circumstances disclosed by the record it is apparent that the cross-examination of defendant's char-

acter witnesses by the Government was not for the purpose stated by the court (127) of "testing the standard of opinion" of the character witnesses.

We submit that the circumstances justify a reversal of the judgment affirming the conviction on the first count, by reason of the prejudice created against the defendant by the questions put to the character witnesses and to the defendant.

The only prior conviction testified to by defendant was the misdemeanor for possessing watch dials or watch faces, not genuine in 1927 (79-80). He further testified on direct that he had had no other trouble since he had been in the United States (80, fol. 240). The record fails to disclose on direct and cross-examination any evidence as to any arrest of defendant on a charge of receiving stolen goods, as insinuated by the prosecutor's questions (126, 129, 131), and, of course, no such evidence could properly have been introduced, as the trial court correctly charged (154).

The admission of the objectionable questions in this case not only deprived the defendant of his right to the probative force of the evidence of good character (*U. S.* v. *Antonelli Fire Works*, 155 F. (2d) 633; 639), but tended to persuade the jury to infer that he was a person of bad character. We submit that the questions by the prosecutor to the character witnesses in the case at bar, not a "strong" case as defined in *Berger* v. *U. S.*, 295 U. S. 78, 89, did tend to induce the verdict.

The destruction of defendant's character evidence through the questions asked, and permitted here, prevented

defendant from raising a reasonable doubt as to his guilt which might have resulted in his acquittal.

The Supreme Court, in *Edgington v. U. S.*, 164 U. S. 361, in referring to evidence of good character, stated that the circumstance may be such that a reputation for good character, if relevant to the issue, would *alone* create a reasonable doubt, although without it the other evidence would be convincing (p. 366):

> "* * * the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would *alone* create a reasonable doubt, although without it the other evidence would be convincing." (Emphasis mine.)

The disputed questions created undue prejudice upon issues which may well have been resolved in his favor had his objections been sustained and defendant allowed the benefit of such character evidence. The prejudice created here strongly indicates that the guilt of the defendant was not "found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts". (*Bollenbach v. U. S.*, 326 U. S. 607, 614).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for the writ should be granted as the fundamental questions involved in this application are of sufficient importance to require the exercise of this Court's supervisory jurisdiction by a writ of certiorari.

Respectfully submitted.

February 16th, 1948.

Louis J. Castellano,
Attorney for Petitioner,
32 Court Street,
Brooklyn 2, New York.

Appendix A—Statute Involved

Title 18, United States Code, Section 91, states in part:

> "Whoever shall promise, offer, or give, * * * any money or other thing of value, * * * to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof, * * * with intent to influence his decision or action on any question, matter, cause or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or to omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the things so offered, promised, given, made, or tendered, or caused or procured to be so offered, promised given, made or tendered, and imprisoned not more than three years."

Appendix B—Opinion

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 130—October Term, 1947.

(Argued January 8, 1948 Decided January 26, 1948.)

Docket No. 20818

UNITED STATES OF AMERICA,

Appellee,

v.

SOLOMON MICHELSON,

Defendant-Appellant.

Before:

SWAN, CHASE and FRANK,

Circuit Judges.

Appeal from a judgment of conviction, on two counts, entered by the United States District Court for the Eastern District of New York. Affirmed as to the First Count; Reversed as to the Second Count.

J. VINCENT KEOGH (Mario Pittoni, of counsel), *for appellee.*

LOUIS J. CASTELLANO (Brooklyn, N. Y.), *for appellant.*

Appendix B—Opinion

Defendant was indicted and tried in the Eastern District of New York for violation of 18 U. S. C. A. 91 which provides in part as follows: "Whoever shall promise, offer, or give, * * * any money or other thing of value, * * * to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof, * * * with intent to influence his decision or action on any question, matter, cause or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, made, or tendered, or caused or procured to be so offered, promised, given, made or tendered, and imprisoned not more than three years."

The first count of the indictment reads: "That on or about the 29th day of July, 1946, within the Eastern District of New York, the above named defendant, Solomon Michelson, did give a sum of money, to wit: Five Thousand Dollars ($5,000.00), to an officer and a person acting for and on behalf of the United States in an official function under the authority of the Treasury Department, to wit: Maurice M. Kratter, Internal Revenue Agent, with intent to influence his decision and action on a question and matter then pending before him in his official capacity, with intent

to influence said Internal Revenue Agent to collude in and allow a fraud on the United States and to induce him to do an act in violation of his lawful duty in respect to the defendant's income tax return. (Title 18, United States Code, Section 91.)" The second count is identical with the first, except that the words "to offer" are substituted for the word "give." The jury found defendant guilty on both counts. The judge sentenced him to imprisonment for eighteen months on the first, and to imprisonment for eighteen months and a fine of $2,500 on the second, the prison sentences to run concurrently.

FRANK, *Circuit Judge*:

The Second Count

We think that Congress, as it lawfully may, provided that to "offer" a bribe and to "give" a bribe are two distinct crimes even when parts of a single transaction, since the one (to "give") involves an element which the other (to "offer") does not.[1] The test, as stated in *Morgan* v. *Devine*, 237 U. S. 632, 640, is whether "separate acts have been committed with the requiste criminal intent." The present case does not meet that test. Kratter, the principal government witness, testified as follows: On July 17, 1946, in New York City,[2] defendant offered him

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[1] *Blockburger* v. *United States*, 284 U. S. 299, 303-304; *Albrecht* v. *United States*, 273 U. S. 1, 11; *Burton* v. *United States*, 202 U. S. 344, 377; *Morgan* v. *Devine*, 237 U. S. 632, 640; *Gavieres* v. *United States*, 220 U. S. 338, 342; *Lindsay* v. *United States*, 134 F. (2d) 960, 961 (C. C. A. 10); *cf. American Tobacco Co.* v. *United States*, 328 U. S. 781, 787-788.

[2] New York City is in the Southern District of New York.

a bribe of $5,000, and he told defendant he would take it.[3] Defendant then said that, when he had the money, he would telephone Kratter. On July 26, defendant, on the telephone, told Kratter that he had the money and wanted to meet Kratter to give it to him. On July 29, Kratter by phone, arranged with defendant for a meeting at a room in the St. George Hotel in Brooklyn.[4] Kratter went to that room. His own words, as to what then occurred, follow: "A few minutes later there was a knock on the door. I opened the door and Mr. Michelson came in, and I closed the door after him. He dropped a package on a dresser or chifferobe, something like that that was in the hotel room, and he sat down and I sat down. I asked him if he had the

[3] Kratter's testimony as to that conversation is as follows:

"Q. Did you and Mr. Michelson have a conversation while you were walking along together? A. Yes, a conversation ensued during the walk. Mr. Michelson kept insisting that I do something to straighten out his tax return and fix things up for him so he wouldn't get into too much trouble. He offered me $3,000 while we were walking toward the subway, and then he said, 'Make it $5,000.' I told him I wouldn't touch that kind of money, I wasn't interested in it, I didn't want to get mixed up in that situation. Then he kept insisting. We had walked about two or three blocks from his office, and I finally stopped in the street and kept talking to him. He refused to leave me, and insisted that we come to some sort of agreement regarding his tax situation. I finally told him—he said, 'Will you take $5,000?' And he told me he would pay another $5,000 to the Government. I finally said 'O. K.,' in order to get away from him, and he told me he would call me up when he had the money, and he asked me for my business card and home telephone. I gave him one of my cards and wrote down the phone number while we were standing on the street, and then we parted."

[4] Brooklyn is in the Eastern District of New York.

money, and he said, 'Yes, it is in the bag over there.' I took the bag, unwrapped it, and he took out a large number of five, ten and twenty-dollar bills, and he said, Mr. Michelson said, 'There is $5,000 there.' I made a quick count of the bills and satisfied myself that there was approximately $5,000 in the package * * * " Defendant's conduct at that Meeting in Brooklyn constituted his performance of the agreement of July 17—an illegal bargain resulting from a previously accepted offer—to give the $5,000 bribe.' He did not on that day or at any other time in the Eastern District both offer and give. He merely gave.[5]

The offer of July 17 cannot sustain the conviction on count 2. For defendant made that offer in New York City in the Southern District, and the defendant was indicted and tried in the Eastern District. Had that offer been specified in the indictment, defendant, thus warned of the improper venue, would have waived the lack of proper venue by going to trial without interposing an objection.[6] The same might have been true if, during the trial, defendant had in some manner been put on notice that the government intended to rely on that New York City offer as a crime, for which he was being tried. But here there

[5] Kratter testified that after he had thus received the money, "I asked Mr. Michelson what he wanted me to do for the money, and he told me he wanted me to turn in a report which would indicate that he owed about $1,200 on his 1943 tax return and about $900 on his 1942 return. He said that was all he wanted me to do. Then I told him, 'You understand the only reason I am doing this is because you insist upon it, isn't that so?' And he said, 'Yes, that is right.' "

This conversation did not show a new offer but merely arrangements for carrying out the details of the previous agreement.

[6] *United States* v. *Jones*, 102 F. (2d) 72 (C. C. A. 2).

was nothing so to notify him. Indeed, the trial judge, in his charge, told the jury that the issue was whether defendant gave or offered to give, or both, $5,000 to Kratter on July 29 at the Hotel St. George. We therefore conclude that we must reverse as to the second count.

Alleged Errors as to the First Count

1. The defendant called three character witnesses who testified that he had an excellent reputation for "honesty, truthfulness and being a law-abiding citizen." On cross-examination, they were asked whether they had heard (a) that in 1927 he had been convicted in a New York court and sentenced to pay a fine of $100 or 30 days in jail, and (b) that in 1920 he had been arrested for receiving stolen goods.

The judge, out of the jury's presence, received the assurance of the government's counsel that defendant had been thus arrested in 1920. The defendant, on the witness-stand, had previously admitted the conviction in 1927. The judge, when these witnesses were being questioned, said: "However, I instruct the jury that what is happening now is this: the defendant has called character witnesses, and the basis for the evidence given by those character witnesses is the reputation of the defendant in the community, and since the defendant tenders the issue of his reputation the prosecution may ask the witness if she has heard of various incidents in his career. I say to you that regardless of her answer you are not to assume that the incidents asked about actually took place. All that is happening is that this witness' standard of opinion of the reputation

of the defendant is being tested. Is that clear?" In his charge to the jury, the judge said: "In connection with the character evidence in the case I permitted a question whether or not the witness knew that in 1920 this defendant had been arrested for receiving stolen goods. I tried to give you the instruction then that that question was permitted only to test the standards of character evidence that these character witnesses seemed to have. There isn't any proof in the case that could be produced before you legally within the rules of evidence that this defendant was arrested in 1920 for receiving stolen goods, and that fact you are not to hold against him; nor are you to assume what the consequences of that arrest were. You just drive it from your mind so far as he is concerned, and take it into consideraton only in weighing the evidence of the character witnesses." The questions were of the kind often held proper in examining "character witnesses."[7] That being the rule, we see no abuse of discretion in permitting them to be asked here.[8] Defendant asserts error in putting

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[7] See, *e.g.*, *Mannix* v. *United States*, 140 F. (2d) 250, 252 (C. C. A. 4); *Josey* v. *United States*, 135 F. (2d) 809, 811 (App. D. C.); *Spalitto* v. *United States*, 39 F. (2d) 782, 785-787 (C. C. A. 8); *cf. Stewart* v. *United States*, 104 F. (2d) 234, 235 (App. D. C.).

[8] Wigmore, *Evidence* (3d ed. 1940) §988, after noting that "such inquiries are almost universally admitted," not as "impeachment by extrinsic testimony of particular acts of misconduct," but as means of testing the character "witness' grounds of knowledge," continues with these comments: "But the serious objection to them is that practically the above distinction between rumors of such conduct, as affecting reputation, and the fact of it as violating the rule against particular facts—cannot be maintained in the mind of the jury. The rumor of the misconduct, when admitted, goes far, in spite of all theory and of the judge's charge, towards fixing the misconduct

the question about the 1920 arrest to a witness who had known defendant only since 1932. We cannot agree; for she might have heard rumors of an arrest which happened before she knew him.

3. On direct examination by his own counsel, defendant testified to his conviction in 1927 on a charge of possessing counterfeit watch-dials, but that he had no other trouble since he had been in the United States. On cross-examination, defendant testified that, in 1930, in an application signed by him for a license for vending second-hand jewelry, he had never been arrested for any offense. Thereupon he was asked whether he had stated in this application that

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as a fact upon the other person, and thus does three improper things,—(1) it violates the fundamental rule of fairness that prohibits the use of such facts, (2) it gets at them by hearsay only, and not by trustworthy testimony, and (3) it leaves the other person no means of defending himself by denial or explanation, such as he would otherwise have had if the rule had allowed that conduct to be made the subject of an issue. Moreover, these are not occurrences of possibility, but of daily practice. This method of inquiry or cross-examination is frequently resorted to by counsel for the very purpose of injuring by indirection a character which they are forbidden directly to attack in that way; they rely upon the mere putting of the question (not caring that it is answered negatively) to convey their covert insinuation. The value of the inquiry for testing purposes is often so small and the opportunities of its abuse by underhand ways are so great that the practice may amount to little more than a mere subterfuge, and should be strictly supervised by forbidding it to counsel who do not use it in good faith."

Because, as Wigmore says, the jury almost surely cannot comprehend the judge's limiting instruction, the writer of this opinion wishes that the United States Supreme Court would tell us to follow what appears to be the Illinois rule, viz., that such questions are improper unless they relate to offenses similar to those for which the defendant is on trial. See *Aikin v. People*, 183 Ill. 215, 55 N. E. 695; cf. *People v. Hannon*, 381 Ill. 200, 44 N. E. (2d) 923.

he had been convicted of 'counterfeiting trade-marks on watches." His counsel objected on the ground that the conviction had been for "possession of counterfeit." The court said, "Sustained on that ground." Government counsel then asked, "You did not say in that paper that you had been arrested and that you were convicted of that charge?" No objection was made. We find no prejudicial error.

4. Defendant complains that the judge in his charge unfairly interpreted the testimony of a witness, Osterfeld, in a manner prejudicial to defendant. We think the interpretation not unfair. But, even assuming the contrary, there is no reversible error. In the first place, defendant did not object to this part of the charge.[9] In the second place, the judge made it plain that, despite his comments on the evidence, the jury were to rely on their own recollection of the evidence.

AFFIRMED AS TO THE FIRST COUNT; REVERSED AS TO THE SECOND.

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[9] See *United States* v. *Marino*, 141 F. (2d) 771 (C. C. A. 2). Nor did he object to a question the judge put to that witness, a question, moreover, which we think entirely proper.